

FARHAD NOVIAN (State Bar No. 118129)
farhad@novianlaw.com
SHARON RAMINFARD (State Bar No. 278548)
sharon@novianlaw.com
ALEXANDER KANDEL (State Bar No. 306176)
alexanderk@novianlaw.com
NOVIAN & NOVIAN LLP
1801 Century Park East, Suite 1201
Los Angeles, California 90067
Telephone: (310) 553-1222
Facsimile (310) 553-0222

Attorney for Plaintiff,
L.A. T-SHIRT & PRINT, INC.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

L.A. T-SHIRT & PRINT, INC., a
California corporation dba RIOT
SOCIETY

Plaintiff,

v.

FASHION NOVA, INC., a California
corporation; and DOES 1 through 10,
inclusive,

Defendants.

Case No.: 2:18-cv-9984 DSF (JCx)

[Assigned to the Honorable Dale S.
Fischer]

**PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO FASHION
NOVA, INC.'S MOTION FOR
SUMMARY JUDGMENT OF NON-
INFRINGEMENT**

Hearing Date: August 26, 2019

Time: 1:30 p.m.

Courtroom: 7D

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1 17 U.S.C. § 50425

2 17 U.S.C. § 50525

3 **Rules**

4 Federal Rule of Civil Procedure 1219

5 Federal Rule of Civil Procedure 5616

6 Federal Rule of Civil Procedure 719

1 **I. INTRODUCTION**

2 This Action arises out of the willful acts of copyright infringement
 3 perpetrated by Defendant Fashion Nova, Inc. (“Defendant”) in connection with
 4 the popular Panda Rose design (“Original Design”) of the Plaintiff, L.A. T-Shirt
 5 & Print, Inc., a California corporation dba Riot Society (“Riot Society”).
 6 Capitalizing on the intellectual property and labor of Riot Society, Defendant
 7 hijacked Riot Society’s merchandise campaign by selling merchandise, including
 8 sweatshirts (“Infringing Garment”), bearing a design that is identical, or nearly
 9 identical, to the Original Design (“Infringing Design”). Defendant continues to
 10 sell the Infringing Garment to this day.

11 To make matters worse, Defendant’s infringement is willful. In or around
 12 June 2018, Defendant contacted Riot Society to ask Riot Society whether it would
 13 be interested in forming a partnership that would allow Defendant to sell
 14 sweatshirts depicting the Original Design on Defendant’s products. When Riot
 15 Society declined the proposed partnership, Defendant proceeded to take matters
 16 into its own hands, selling the Infringing Garments without Riot Society’s
 17 permission.

18 As reprehensible as Defendant’s conduct has been, its legal machinations
 19 have not been any better. Defendant has now filed Fashion Nova, Inc.’s Notice of
 20 Motion and Motion for Summary Judgment of Noninfringement; Memorandum of
 21 Points and Authorities (Dkt. No. 28) (the “Motion”).

22 First, in violation of this District’s Local Rules and this Court’s Standing
 23 Order for Cases Assigned to Judge Dale S. Fischer (Dkt. No. 8) (“Standing
 24 Order”), Defendant did not engage in a meaningful, good-faith meet and confer
 25 process. In fact, during the cursory and vague meet and confer call Defendant
 26 conducted, Defendant did not even mention many of the arguments it is now
 27 making in the Motion.

28 Compounding Defendant’s failure to meet and confer, Defendant failed to
 give Riot Society anything more than vague bullet points, offering absolutely no

1 authority other than a general reference to the “Copyright Act,” for the remaining
2 arguments. Additionally, in violation of this District’s Local Rules and this
3 Court’s Order re Motions for Summary Judgment (“MSJ Order”), Defendant
4 failed to lodge any proposed Statement of Uncontroverted Facts and Conclusions
5 of Law/ Separate Statement of Uncontroverted Facts and Conclusions of Law.
6 This not only deprives the Court and Riot Society of the ability to identify
7 Defendant’s purportedly undisputed facts without having to scour the record, but
8 it deprives Riot Society of the ability to respond with a meaningful Statement of
9 Genuine Disputes, as Riot Society has no proposed uncontroverted facts to
10 respond to. Further, in violation of this Court’s Standing Order, Defendant filed a
11 proposed order that contains its attorney names and addresses on the caption page
12 and a footer with the document name. For all the foregoing reasons, the Motion is
13 procedurally defective and should be denied.

14 Defendant’s disregard for the rule of law does not end with this District’s
15 Local Rules and this Court’s standing orders, but extends to the Federal Rules of
16 Civil Procedure and the Federal Rules of Evidence as well. Defendant has failed
17 to present any expert evidence and has failed to present any authenticated exhibits
18 in support of its Motion. Indeed out of the 9 exhibits (A-I) that Defendant
19 purports to submit in support of its Motion, only 2 exhibits (B-C) are even
20 mentioned in a declaration. No exhibit is properly authenticated. As such, the
21 Motion is deficient from an evidentiary standpoint, and should be denied.

22 Further, Defendant’s substantive arguments lack merit. First, Defendant
23 argues, that Riot Society lacks standing to bring this suit because Riot Society
24 submitted its copyright “application, materials, and fee” to the Copyright Office
25 on November 27, 2018 and filed this suit three days later on November 30, 2018.
26 Defendant did not even mention this argument during the meet and confer
27 process. In its Motion, Defendant admits that “[i]n theory, such turnaround time
28 for processing a copyright application may be possible [but] ... highly improbable

1 and near [sic] impossible.” A motion for summary judgment must rely on
2 concrete evidence, and not on hypothetical conjecture of what is and is not
3 “improbable.” More importantly, 17 U.S.C. § 410(d) expressly states that “[t]he
4 effective date of a copyright registration is the day on which an application,
5 deposit, and fee ... have all been received in the Copyright Office.” These are the
6 same items that Defendant admitted Riot Society submitted to the Copyright
7 Office on November 27, 2018. Further, Riot Society’s valid Certificate of
8 Registration unequivocally lists the Effective Date of Registration as November
9 27, 2018. Thus, Riot Society has standing to bring this lawsuit. Even if Riot
10 Society lacked standing at the time it filed this lawsuit (which it did not),
11 Defendant would at most be entitled to a dismissal without prejudice until the
12 certificate is issued. Since Riot Society has a valid copyright certificate today, it
13 would refile this lawsuit on the day of the dismissal.

14 Second, Defendant argues that Riot Society fails to state a claim for
15 copyright infringement because the elements in the Original Design are
16 unoriginal. Defendant relies on an unauthenticated screenshot of a Google search
17 to show the Court what a panda looks like. Defendant did not even mention the
18 argument regarding its Google search of “panda” during the meet and confer.
19 Defendant seems to miss obvious differences between the photographs of pandas
20 it purportedly Googled and the Original Design, which portrays a unique and
21 cartoonish black and white rendition of a panda bear face where the panda is
22 forward looking; the eyes lack pupils; the ears contain a white outline; with a rose
23 placed in the mouth of the panda bear; with the rose bud on the right, stem on the
24 left, and leaves throughout; and four Chinese letters above the panda. Not one of
25 these unique features is depicted in any of the 15 images depicted in Defendant’s
26 screenshot of the Google search for “panda.” Defendant also claims that it located
27 a downloadable phone screen wallpaper from at least as early as 2011 which
28 depicts “the notion of a giant panda with a rose in its mouth in a nearly identical

1 manner.” This second image is unauthenticated, and Riot Society has no way of
2 verifying whether this image existed as early as 2011. Defendant has not
3 indicated what website the image was purportedly pulled from, when it was
4 pulled, or even what Google search was performed. Indeed, the earliest image of
5 this wallpaper that Plaintiff can locate is from 2018. In any event, there are
6 significant differences between the phone screen wallpaper and the Original
7 Image in the depiction, orientation and placement of the images.

8 Third, Defendant argues, without any expert evidence, that there are
9 differences between the Original Design and the Infringing Design. To make this
10 argument, Defendant points to an unauthenticated image of what it purports to be
11 the Infringing Garments, not to actual sample material of the Infringing Design.
12 Defendant argues that the differences “would be apparent to a reasonable juror.”
13 Perhaps a reasonable juror would agree, perhaps not. This is exactly why this
14 issue needs to be resolved at trial. Defendant seems to miss numerous similarities
15 between the Original Design and the Infringing Design which a reasonable juror
16 would consider, including that both designs prominently display a very specific
17 black and white rendition of a panda bear; the panda bear is forward looking; the
18 eyes, nose, and mouth are in black, the ears are in black, with the rose bud on the
19 right, the stem on the left, and leaves throughout; with Chinese letters, in a curved
20 orientation above the panda bear, that are similar in numbering and spacing.

21 Further, Defendant misconstrues 17 U.S.C. § 412, and relies on the wrong
22 version of Riot Society’s complaint, to argue that Riot Society is not entitled to
23 statutory damages and fees. Defendant claims that Riot Society failed to file a
24 copyright application within one month after learning of Defendant’s copyright
25 infringement in June 2018, as alleged in the Complaint (Dkt. No. 1). Defendant is
26 attempting to mislead the Court by citing to the wrong version of the Complaint,
27 which contained an inadvertent clerical error. Riot Society’s First Amended
28 Complaint (Dkt. No. 10), which is the operative complaint, clearly alleges that

Riot Society discovered Defendant's copyright infringement in October, not June, 2018. Riot Society indeed discovered Defendant's infringement in October, not June. Riot Society filed this Action in November, 2019, within one month after making this discovery.

II. SUMMARY OF DISPUTED MATERIAL FACTS

A. Defendant's Willful Infringement

Riot Society was incorporated in January 2012 and is in the business of manufacturing, wholesale, and direct sale to consumers, of high end clothing lines and accessories, many of which display Riot Society's copyrighted designs.

Plaintiff's Separate Statement of Genuine Disputes ("Separate Statement") ¶ 1.

Riot Society manufactures and distributes the Panda Rose Men's Hoodie, as well as long-sleeve shirts and T-shirts, bearing the Original Design ("Original Garment"). *Id.* ¶ 3. Riot Society sells the Original Garment hoodie on its website,

<https://riotsociety.com/products/panda-rose-mens-hoodie> for \$48.00. *Id.* In

certain circumstances, such as its Amazon Fashion store,

[https://www.amazon.com/Riot-Society-Graphic-Hooded-](https://www.amazon.com/Riot-Society-Graphic-Hooded-Sweatshirt/dp/B07G9RF1JV)

[Sweatshirt/dp/B07G9RF1JV](https://www.amazon.com/Riot-Society-Graphic-Hooded-Sweatshirt/dp/B07G9RF1JV), Riot Society sells the Original Garment Hoodie for

\$55.50. Separate Statement ¶ 4. Riot Society also sells the Original Garment

wholesale to other sellers. *Id.* ¶ 5. The Original Garment is one of Riot Society's

best-selling products. *Id.* ¶ 6. Riot Society has sold over approximately 50,000

units of the Original Garment, including hoodies, long-sleeve shirts, and T-shirts.

Id.

Defendant is known for selling "low-price" merchandise. *See*

<https://www.businessoffashion.com/community/people/richard-saghian>. In or

around June 2018, Casey Haines, a buyer for the Defendant, contacted Michael

Homayounian, an officer, director, and majority shareholder of Riot Society.

Separate Statement ¶ 7. Mr. Haines proposed a partnership between the two

companies, where Defendant would sell merchandise designed by Riot Society,

depicting the Original Design. *Id.* Due to Defendant's very low price points,

1 lower quality merchandise due to low price points, “private label” business model,
 2 and reluctance to include Riot Society’s brand name on its merchandise, Riot
 3 Society (which is known for quality merchandise and higher prices), decided
 4 against the partnership and declined Defendant’s offer. *Id.* ¶ 8.

5 In or around October 2018, Mr. Homayounian learned that Defendant was
 6 selling the Infringing Garment on its website for \$22.99, substantially less than the
 7 \$48.00 or \$55.50 Riot Society sells the Original Garment hoodie for. *Id.* ¶ 9. Mr.
 8 Homayounian then contacted Mr. Haines, in an attempt to clarify what he hoped
 9 was a mere misunderstanding. *Id.* Shortly after contacting Mr. Haines, Mr.
 10 Homayounian was delighted to learn that Defendant took down the Infringing
 11 Garment from its website. *Id.* In light of what Mr. Homayounian believed to be
 12 Defendant’s good faith attempt to rectify the problem, Mr. Homayounian and Riot
 13 Society decided not to take any further action against Defendant. *Id.*

14 Mr. Homayounian’s and Riot Society’s delight, however, was short lived.
 15 A few hours later, Mr. Homayounian learned that Defendant relisted the
 16 Infringing Garment on its website,
 17 <https://www.fashionnova.com/products/always-love-sweatshirt-black>, on sale for
 18 \$14.98, even less than its original listing price of \$22.99. Separate Statement ¶
 19 10. The Infringing Garment remains on sale for \$14.98 to this day. *Id.*

20 **B. The Original Design and the Infringing Design**

21 On or about November 27, 2018, Riot Society submitted its application,
 22 deposit material, and fee to the United States Copyright Office in order to register
 23 the Original Design. *Id.* ¶ 2. The Copyright Office approved Riot Society’s
 24 application, and issued a Certificate of Registration, Registration Number VA 2-
 25 128-972, with an Effective Date of Registration of November 27, 2018. *Id.* The
 26 date of first publication is Mach 1, 2017. *Id.* A few days after the effective date
 27 of its copyright registration, Riot Society filed this Action to protect its intellectual
 28 property.

The Original Design is substantially different from the panda images

Defendant located by Googling “panda.” *Id.* ¶ 24. The Original Design portrays a unique and cartoonish black and white rendition of a panda bear face where the panda is forward looking; the eyes lack pupils; the ears contain a white outline; with a rose placed in the mouth of the panda bear; with the rose bud on the right, stem on the left, and leaves throughout; and Chinese letters above the panda. *Id.* Not one of these features is depicted in any of the 15 images depicted in Defendant’s Google screenshot of the word “panda.” *Id.*

With regards to the downloadable screen wallpaper image Defendant claims existed as early as 2011 (“Wallpaper Design”), the only version of it that Riot Society can locate was published in 2018 (2018-08-12), after the date of first publication of the Original Design in March 2017. *Id.* ¶ 25. The Wallpaper Design is different from the Original Design. *Id.* ¶ 26. The panda in the Wallpaper Design is facing in various orientations, not only forward; the panda in the Wallpaper Design has a bigger head and appears to be smiling; the panda face in the Wallpaper Design appears to be thicker and 3 dimensional; the eyes in the Wallpaper Design have pupils; the color of the rose and leaves and their orientation is different; and the ears of the panda in the Wallpaper Design do not have a white outline. *Id.* In all of these ways, the Wallpaper Design differs from the Original Design. *Id.*

There are numerous similarities between the Original Design and the Infringing Design, including that both designs prominently display a very specific black and white rendition of a panda bear; the panda bear is two dimensional, forward looking; the eyes, nose, and mouth are in black; the ears are in black, with the rose bud on the right, the stem on the left, and leaves throughout; with Chinese letters, in a curved orientation above the panda bear, that are similar in numbering and spacing. *Id.* ¶ 27.

C. Defendant’s Refusal to Engage in a Good-Faith Meet and Confer Process

On or about July 8, 2013, Defendant first contacted Riot Society to meet

1 and confer regarding the Motion. *Id.* ¶ 11. On July 10, counsel for Riot Society
 2 attempted to call counsel for Defendant to meet and confer. Defendant's counsel
 3 claimed it was unavailable. *Id.* Riot Society's counsel then emailed Defendant's
 4 counsel, asking if it was able to speak later that same day. *Id.* Defendant's counsel
 5 replied that his assistant will be in touch regarding available dates. *Id.* When Riot
 6 Society's counsel heard from the assistant, he mistakenly asked to meet and
 7 confer on July 23, having made a clerical error in calculating the deadline for this
 8 Motion. *Id.* ¶ 12. Defendant's counsel made the same mistake, offering times on
 9 July 23. *Id.* When Riot Society's counsel realized of the mistake, he offered to
 10 meet and confer that very same day, July 17, 5 days prior to the meet and confer
 11 cutoff of July 22. *Id.* ¶ 13.

12 On July 17, 2019, Defendant's counsel called Riot Society's counsel to
 13 meet and confer. *Id.* ¶ 14. The call lasted just a few minutes, and the majority of
 14 it was related to settlement and discovery discussions. *Id.* Defendant's counsel
 15 did not provide a list of arguments, authorities, or evidence it intended to cite
 16 before the call. *Id.* During the call, Defendant's counsel presented only vague
 17 and general topics. *Id.* Defendant's counsel informed Riot Society's counsel that
 18 Defendant intends to move for summary judgment on 3 issues: (1) lack of
 19 substantial similarity; (2) reference to the Wallpaper Design that was allegedly
 20 found in 2012 or earlier¹; and (3) the argument that Riot Society is not entitled to
 21 statutory damages. *Id.* ¶ 15. Defendant did not at all mention the arguments that:
 22 (1) Riot Society lacks standing to assert this copyright claim and; (2) that the
 23 Original Design is unoriginal because the Original Design is the famous and
 24 commonly depicted panda bear. *Id.* Riot Society first learned of these arguments
 25 in the Motion. *Id.*

26 With regards to the 3 arguments that Defendant's counsel did mention
 27 during the call, he did not point to a single case or other authority, other than a
 28

¹ In the Motion, Defendant claims the design was found in 2011 or earlier.

1 general reference to the “Copyright Act.” *Id.* ¶ 16. He did not answer Riot
2 Society’s counsel’s questions as to what evidence will be submitted, and whose
3 declarations such evidence will be authenticated by. *Id.*

4 With regards to Defendant’s argument of lack of substantial similarity,
5 during the meet and confer, Defendant’s counsel merely said that he is aware of
6 distinction between the Chinese symbol, panda bear, rose and English writing
7 between the Original Image and the Infringing Image. *Id.* ¶ 17. He provided no
8 details. *Id.* He also stated that he reserves the right to bring attention to other
9 differences between the two images in the Motion. *Id.* He also stated that he has
10 not yet decided what, if any evidence or authority, he will cite in support of this
11 argument. *Id.*

12 With regards to Defendant’s argument that the Wallpaper Design was found
13 in 2012 or earlier, during the meet and confer, Defendant’s counsel merely said
14 that he is aware of an image from 2012 (or earlier) that is identical to the Original
15 Design. *Id.* ¶ 18. He did not state where he found the image. *Id.* He stated that
16 in its Motion, Riot Society will include a screenshot with a time tracker showing
17 when the Wallpaper Design was posted online. *Id.* It has failed to do so. *Id.* He
18 was unable to respond as to whether or not Riot Society will rely on any authority
19 in support of this position. *Id.*

20 With regards to Defendant’s argument that Riot Society is not entitled to
21 statutory damages, during the meet and confer, Defendant’s counsel merely said
22 that Defendant will argue that statutory damages will not apply. *Id.* ¶ 19. He
23 declined to provide any authority for this position, other than a general reference
24 to the “Copyright Act.” *Id.* He indicated Defendant will introduce Riot Society’s
25 copyright application into evidence in the Motion. *Id.* Defendant has failed to do
26 so. *Id.* Defendant’s counsel stated he has not yet decided what, if any authority,
27 and other evidence, Defendant will cite in support of this argument. *Id.*

28 Defendant’s counsel also stated that the list of issues he raised is not an

1 exhaustive list, and Defendant reserves the right to raise other issues in the
 2 Motion. *Id.* ¶ 20. When Riot Society’s counsel asked Defendant’s counsel what
 3 the other issues may be, what evidence would support them, and what authority
 4 would support these positions, Defendant’s counsel was unable to answer. *Id.*
 5 Defendant did not offer to negotiate the hearing date. *Id.* ¶ 21. Prior to ending the
 6 call, Riot Society’s counsel informed Defendant’s counsel that Defendant failed to
 7 satisfy this District’s meet and confer requirements. *Id.* ¶ 22.

8 On or about July 17, 2019, the same day as the call, Riot Society’s counsel
 9 memorialized the above issues in an email to Defendant’s counsel. *Id.* ¶ 23. On
 10 or about July 18, 2019, Defendant’s counsel responded, stating that Riot Society
 11 too did not provide any evidence in support of its position, adding that the burden
 12 to meet and confer falls on both parties. *Id.* Riot Society’s counsel then replied,
 13 stating that the burden to meet and confer is on the moving party and that given
 14 that Defendant provided no evidence or authority during the call, Riot Society
 15 simply had nothing to respond to. *Id.* Defendant failed to respond to the meet and
 16 confer portion of this email² or otherwise further meet and confer prior to filing
 17 the Motion, despite having 5 more days prior to the meet and confer cutoff. *Id.*

18 **D. Defendant’s Motion**

19 Defendant filed the Motion without a proposed Statement of Uncontroverted
 20 Facts and Conclusions of Law. Defendant filed a proposed judgment that includes
 21 its attorneys’ names and addresses on the caption page and a footer with the
 22 document name. Of 9 exhibits (A-I) included with Defendant’s Motion, only 2 (B-
 23 C) are mentioned in a declaration.

24 **III. DEFENDANT VIOLATED THIS COURT’S RULES AND THE FEDERAL RULES OF CIVIL PROCEDURE AND EVIDENCE**

25 **A. The Court Should Deny Defendant’s Motion for Refusing to Meet and Confer in Good Faith**

26 Pursuant to this District’s Local Rules, “counsel contemplating the filing of
 27 any motion shall first contact opposing counsel to discuss *thoroughly*, preferably
 28

² Part of the email addressed settlement and discovery negotiations, which Defendant responded to.

1 in person, the *substance* of the contemplated motion and any potential resolution.”

2 L.R. 7-3 (emphasis added). Additionally, this Court’s Standing Order states:

3 Counsel **must** comply with Local Rule 7-3. ... Counsel should discuss the
4 issues to a sufficient degree that if a motion is still necessary, the briefing
5 may be directed to those substantive issues requiring resolution by the Court.
6 ... **Failure to comply with this Rule will be grounds for sanctions. If
7 fault is attributed to the moving party, the Court may decline to hear
8 the motion.**

8 Standing Order (Dkt. No. 8) at 5:13-21 (emphasis in original).

9 “The meet-and-confer requirement of Local Rule 7-3 assists in promoting
10 the resolution of disputes without requiring the intervention of the Court. It also
11 serves the important purpose of providing the opposing party sufficient notice as to
12 the contents of a proposed motion and an opportunity to negotiate on the hearing
13 date.” *Cerelux Ltd. V. Yue Shao*, Case No. CV 17-02909-MWF (KSx), 2017 WL
14 4769459, at *1 (C.D. Cal. Jun. 9, 2017). The burden of complying with L.R. 7-3
15 falls on the moving party. *See Beets v. Molina Healthcare, Inc.*, CV 16-05642-AB
16 (KSx), 2016 WL 10966562, at *1, fn. 1 (C.D. Cal. Sep. 22, 2016) (“**Movants** must
17 comply with the Local Rules, which require the parties to meet and confer.”)
18 (emphasis added).

19 “Local rules have the ‘force of law’ and are binding upon the parties and
20 upon the court, and a departure from local rules that affects ‘substantial rights’
21 requires reversal.” *Professional Programs Group v. Department of Commerce*, 29
22 F.3d 1349, 1353 (9th Cir. 1994). This Court “has considerable latitude in
23 managing the parties’ motion practice and enforcing local rules.” *Christian v.*
24 *Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002); *see also James R. Glidwell*
25 *Dental Ceramics, Inc. v. Philadelphia Indem. Ins. Co.*, No. 8:16-CV-01155-JLS
26 (Ex), 2016 WL 9223782, at *1 (C.D. Cal. Sep. 12, 2016) (“Parties must strictly
27 adhere to the Local Rules of this district, and a district court has the discretion to
28 strike any motion that fails to comply with the Local Rules.”). “Due to the
importance of Local Rule 7-3 in furthering judicial economy, a failure to comply

1 with L.R. 7-3 can result in the court striking or denying the motion.” *Oliver v.*
 2 *Luner*, Case No. LA 18-cv-02562 VAP (AFMx), 2018 WL 5928170, at *1 (C.D.
 3 Cal. May 21, 2018); *see also Cucci v. Edwards*, 510 F. Supp. 2d 479, 486 (C.D.
 4 Cal. 2007) (“[T]he Court may deny Plaintiff’s motion on [the] basis [of failing to
 5 meet and confer] alone.”). Courts in this District have denied summary judgment
 6 motions because the moving party has failed to comply with L.R. 7-3. *See e.g.,*
 7 *Singer v. Live Nation Worldwide, Inc.*, No. SACV 11-0427 DOC (MLGx), 2012
 8 WL 123146 (C.D. Cal. Jan. 13, 2012).

9 Here, Defendant, who is the moving party, engaged in a cursory meet and
 10 confer call to check the box and claim that it satisfied L.R. 7-3. In reality, it did
 11 not. Defendant raised numerous arguments in the Motion that it did not even
 12 mention during the call. Defendant did not attempt to negotiate the hearing date.
 13 Indeed, considering how close to the MSJ cutoff deadline Defendant waited before
 14 first contacting Riot Society to conduct the call, it does not appear that there was
 15 any opportunity to hold such negotiations. This is evidenced by the fact that
 16 Defendant filed the Motion on the last possible day for it to be heard before the
 17 MSJ cutoff.³ Defendant did not cite to a single case or authority, other than a
 18 general reference to the “Copyright Act” during the meet and confer call, despite
 19 Riot Society’s counsel asking Defendant’s counsel for such authority. Defendant
 20 did not identify any evidence it will include in the Motion or how it will
 21 authenticate such evidence, despite Riot Society’s counsel asking Defendant’s
 22 counsel for such evidence.

23 The incompleteness, brevity and vagueness of Defendant’s meet and confer
 24 call came nowhere close to “serv[ing] the important purpose of providing the
 25 opposing party sufficient notice as to the contents of [the] proposed motion and an
 26 opportunity to negotiate the hearing date.” *See CereLux*, 2017 WL 4769459, at *1.

28 ³ Pursuant to this Court’s MSJ Order, “[a]s a courtesy to both the Court and the opposing party, a moving party should not wait until the last possible day to file motions for summary judgment or partial summary judgment.” MSJ Order at 1:25-27.

1 Indeed, by raising entirely new arguments in the Motion that were never even
 2 mentioned during the call, offering zero authority or any evidence for any of its
 3 positions during the call, and not offering to negotiate the hearing date, the only
 4 purpose Defendant even held the brief meet and confer call was to “check the box”
 5 and tell the Court that it complied with L.R. 7-3. While this Court’s Standing
 6 Order instructs the parties to attempt to narrow the issues before the Court during
 7 the meet and confer, this was simply impossible given the incompleteness, brevity
 8 and vagueness of Defendant’s meet and confer call. Defendant gave Riot Society
 9 nothing of substance to look into and respond to.

10 Riot Society gave notice to Defendant of its failure to comply with Local
 11 Rule 7-3 during the meet and confer call and in a follow up email that same day.
 12 Despite having 5 more days to rectify its noncompliance before the meet and
 13 confer cutoff to file the Motion on the last possible day before the MSJ cutoff,
 14 Defendant chose to do nothing.

15 Defendant had direct notice of the degree of detail required in a meet and
 16 confer call, and of this Court’s power to decline to hear the Motion and sanction
 17 Defendant for failure to comply with L.R. 7-3 from this Court’s Standing Order.
 18 Accordingly, Riot Society respectfully requests that the Court deny the Motion for
 19 Defendant’s refusal to meet and confer.

20 **B. The Court Should Deny Defendant’s Motion for Failing to Provide the**
 21 **Court With a Separate Statement of Uncontroverted Facts and Conclusions of**
 22 **Law**

23 Pursuant to this District’s Local Rules, a separate statement of
 24 uncontroverted facts is **required** from a party moving for summary judgment:

25 A party filing a notice of motion for summary judgment or partial summary
 26 judgment **shall** lodge a proposed “Statement of Uncontroverted Facts and
 27 Conclusions of Law.” Such proposed statement **shall** set forth the material
 28 facts as to which the moving party contends there is no genuine dispute.

L.R. 56-1 Documents Required From Moving Party (emphasis added); *see also*

1 *Hayes v. Superior Court of California*, Case No. CV 10-1818-GW(RCx), 2010 WL
 2 11549761, at *2 (C.D. Cal. Nov. 8, 2010) (“In the Central District of California, a
 3 moving party is **required** to serve and lodge with the motion a separate statement
 4 setting forth the material facts as to which the moving party contends there is no
 5 dispute”) (emphasis added). “If a party fails to comply with these Local Rules, the
 6 Court is not required to sift through the record.” *Young v. Wolfe*, CV 07-3190-
 7 RSWL (RZx), 2009 WL 10677420, at *3 (C.D. Cal. Aug. 6, 2009) (overturned on
 8 other grounds by *Young v. Wolfe*, 478 Fed. Appx. 354 (9th Cir. 2012)).

9 Further, this Court’s MSJ Order provides the moving party with extensive
 10 instructions as to how to prepare the Separate Statement of Uncontroverted Facts
 11 and Conclusions of Law. *See* MSJ Order at 2:13-20. “The separate statement
 12 **shall** be prepared in a two-column format.” MSJ Order at 2:13-14 (emphasis
 13 added). Pursuant to this Court’s MSJ Order, “[w]hen filing or opposing a motion
 14 for summary judgment, a party is to comply **precisely** with Local Rule 56, the
 15 Court’s general Standing Order, and this order.” MSJ Order at 1:21-23 (emphasis
 16 added). By failing to include any statement of uncontroverted facts, Defendant has
 17 blatantly disregarded this Court’s rules and orders. Further, the Court’s MSJ Order
 18 states, “**The moving, opposing and reply papers should refer to the numbered**
 19 **paragraphs in the separate statement, rather than the underlying evidence.**”
 20 MSJ Order at 2:18-20 (emphasis in original). Not only has Defendant failed to
 21 comply with this requirement, but by not including a separate statement at all, it
 22 has deprived Riot Society of the ability to comply with this requirement as well.

23 In *De Santiago v. Bellflower Unified School District*, the party moving for
 24 summary judgment lumped together a collection of 12 exhibits, without providing
 25 the Court with any basis to properly consider the materials and failed to lodge a
 26 proposed Statement of Uncontroverted Facts and Conclusions of Law. Case No.
 27 CV 18-3014-GW(SSx), 2018 WL 6061203, at *2 (C.D. Cal. Oct. 1, 2018). The
 28 Court noted that the movant “has not taken the first necessary steps towards

obtaining summary judgment.” *Id.* at *3. The Court denied summary judgment, declining to “do [the movant’s] work for her in her attempt to satisfy her burden on this motion.” *Id.* In fact, other Courts in this District have denied summary judgment motions that contained a separate statement that was deficient. *See Baker v. Varitalk, Inc.*, Case No. CV 07-6622-VBF (FFMx), 2009 WL 10654600 (C.D. Cal. Mar. 31, 2009).

That is exactly what Defendant is attempting to do here – have the Court do its work for it. Like in *De Santiago*, Defendant has lumped together a collection of numerous exhibits, without properly authenticating them or explaining to the Court any basis on which it should properly consider the exhibits. Further, like in *De Santiago*, Defendant failed to lodge a proposed Statement of Uncontroverted Facts and Conclusions of Law. Unlike in *Baker*, where the movant at least attempted to submit a separate statement, Defendant here submitted nothing at all. The Court should not do Defendant’s work for it. Accordingly, the Court should decline to consider the Motion on the merits.

C. The Court Should Deny Defendant’s Motion for Providing the Court with a Noncompliant Proposed Judgment

Pursuant to this Court’s Standing Order (Dkt. No. 8), proposed orders “**should not contain attorney names, addresses, etc. on the caption page, [and] should not contain a footer with the document name or other information.**” Standing Order at 3:15-17 (emphasis in original). “**Failure to comply with this requirement may result in the denial or striking of the request.**” Standing Order at 3:23-24 (emphasis in original).

Here, Defendant filed a proposed judgment that contained attorney names and addresses on the caption page and a footer with the document name. The Court should not reward Defendant’s repeated disregard for the Court’s rules and orders and should deny the Motion on this ground, as it had warned the parties it may do in its Standing Order.

D. The Court Should Deny Defendant’s Motion for Failing to Provide the Court With Admissible Evidence, in Violation of the Federal Rules of Civil

Procedure and the Federal Rules of Evidence

Pursuant to the Federal Rules of Civil Procedure, a party moving for summary judgment must support its assertions of fact with evidence. Fed. R. Civ. P. 56(c), (e). “A trial court can only consider admissible evidence in ruling on a motion for summary judgment. Authentication is a condition precedent to admissibility.” *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002) (internal quotation marks and citations omitted). The Ninth Circuit has “repeatedly held that unauthenticated documents cannot be considered in a motion for summary judgment.” *Id.*; *see also Cristobal v. Siegel*, 26 F.3d 1488, 1494 (9th Cir. 1994); *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1550-51 (9th Cir. 1989); *Beyene v. Coleman Sec. Services, Inc.*, 854 F.2d 1179, 1182 (9th Cir. 1988); *Canada v. Blain’s Helicopters, Inc.*, 831 F.2d 920, 925 (9th Cir. 1987); *Hamilton v. Keystone Tankship Corp.*, 539 F.2d 684, 686 (9th Cir. 1976).

Here, Defendant submitted nine exhibits (A-I) in support of its Motion. Only 2 of the exhibits (B-C) are even mentioned in the only declaration submitted with the Motion, Declaration of Omid E. Khalifeh in Support of Fashion Nova, Inc.’s Motion for Summary Judgment (“Khalifeh Decl.”). Defendant does not even purport to lay any foundation or to authenticate Exhibits A and D-I in the Khalifeh Decl., or elsewhere. As for Exhibits B and C, Defendant merely cites to them in the Khalifeh Decl. Defendant does not explain how, when, and where they were obtained, and does not authenticate the exhibits as true and correct copies of what they purport to be. Accordingly, the Court should decline to consider any of Defendant’s “evidence,” and should deny the Motion.⁴

IV. A GENUINE ISSUE OF MATERIAL FACT EXISTS AS TO WHETHER DEFENDANT’S INFRINGING GARMENTS INFRINGE RIOT

⁴ To the extent Defendant may attempt to cure any of the Motion’s numerous deficiencies on reply, Riot Society respectfully requests that the Court not allow Defendant to do so. “[C]ourts generally decline to consider arguments made and evidence presented for the first time in a reply brief.” *Optional Capital, Inc. v. Kim*, No. CV 04-3866 ABC (PLAx), 2018 WL 2986660, at *6 (C.D. Cal. Aug. 1, 2008); *see also Santa Margherita, S.p.A. v. Weine*, Case No. CV 12-03499 DSF (RZ), 2013 WL 12125539, at *8 (C.D. Cal. Aug. 28, 2013) (Hon. Dale S. Fischer).

SOCIETY’S ORIGINAL DESIGN**A. Riot Society Has Standing to Assert its Copyright Infringement Claims**

Defendant argues, without ever mentioning this issue during the meet and confer call, that Riot Society lacks standing to assert its copyright infringement claims because it submitted its copyright application, materials, and fee three days prior to filing this Action. Motion at 9:18-22. Defendant concedes that “such turnaround time for processing a copyright application may be possible; however, in reality, it is improbable.” Motion at 9:24-26.

As the United States Supreme Court has held, a party moving for summary judgment must present the Court with concrete evidence, not hypothetical conjecture of what is and is not probable. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (“Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates absence of a genuine issue of material fact.”). “Summary judgment requires facts, not simply unsupported denials or rank speculation.” *McSherry v. City of Long Beach*, 584 F.3d 1129, 1138 (9th Cir. 2009). “[S]tatements ... based on speculation or improper legal conclusions, or argumentative statements, are not facts.” *Burch v. Regents of University of California*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006) (emphasis in original). Evidence of mere probability is not relevant. *See Ass’n of Unit Owners of Nestani v. State Farm Fire and Cas. Co.*, 670 F. Supp. 2d 1156, 1161 (D. Or. 2009) (“[T]estimony that portions of structural members ‘probably’ fell into pieces during the Policy period does not create a genuine issue of fact.”).

Here, Defendant offers no evidence that Riot Society did not have a valid copyright at the time it filed this Action. To the contrary, Defendant admits that that would be “possible.” Defendant speculates, with no basis, that Riot Society’s application was “probably” not granted at the time it filed this Action, while

1 admitting the possibility that it was granted by then. This is no basis for summary
2 judgment.

3 Further, 17 U.S.C. § 410(d), expressly states that “[t]he effective date of a
4 copyright registration is the day on which an application, deposit, and fee... have
5 all been received in the Copyright Office.” These are the same items that
6 Defendant admits Riot Society submitted to the Copyright Office on November 27,
7 2018. Further, Riot Society’s Certificate of Registration unequivocally lists the
8 effective date of registration as November 27, 2018. “A certificate of registration
9 from the U.S. Copyright Office raises the presumption of copyright validity and
10 ownership.” *Unicolors, Inc. v. Urban Outfitters, Inc.*, 853 F.3d 980, 988 (9th Cir.
11 2017).

12 Even if Defendant had presented concrete evidence that Riot Society did not
13 yet have a valid copyright at the time it filed this Action (which Defendant failed to
14 do), Defendant would not be entitled to summary judgment. Defendant cites to
15 *Fourth Estate Pub. Benefit Corporation v. Wall-Street.com, LLC*, 139 S. Ct. 881
16 (2019) for the proposition that actual registration, instead of mere submittal of an
17 application, is necessary in order for a plaintiff to file an action for copyright
18 infringement. Motion at 9:27-10:7.

19 Defendant’s reading of *Fourth Estate*, however, is inapplicable to this
20 Action for three reasons. First, *Fourth Estate* was decided on March 4, 2019, over
21 three months later than the date Riot Society filed this Action. At the time Riot
22 Society filed this Action, the Ninth Circuit unambiguously held that the receipt of a
23 complete application by the Copyright Office satisfied the requirement for
24 registration before bringing a copyright infringement action. *Cosmetic Ideas, Inc.*
25 *v. IAC/Interactivecorp.*, 606 F.3d 612 (9th Cir. 2010). Second, in *Fourth Estate*,
26 the Register had not yet acted on *Fourth Estate*’s applications at the time the
27 district court dismissed the complaint. *Fourth Estate*, 139 S. Ct. at 887. There, the
28 Register ultimately refused registration. *Id.* Here, it is undisputed that Riot

1 Society currently holds a valid copyright certificate. It is also undisputed that its
 2 effective date is November 27, 2018, which is earlier than the date that Riot
 3 Society brought this Action. “Upon registration of the copyright ... a copyright
 4 owner can recover for infringement that occurred both before and after
 5 registration.” *Fourth Estate*, 139 S. Ct. at 886-87. Therefore, under the very case
 6 Defendant cites, *Fourth Estate*, Riot Society is entitled to recover damages for both
 7 before and after its registration, because it has a valid copyright. Third, even
 8 District Courts that have dismissed cases under *Fourth Estate*, have done so
 9 without prejudice, pending outcome of the plaintiff’s copyright application. *See*,
 10 *e.g.*, *Foss v. Spencer Brewery*, 365 F. Supp. 3d 168, 172 (D. Mass. 2019). Here, it
 11 would be a waste of the Court’s time and resources to dismiss Riot Society’s claim
 12 without prejudice. In such an event, because Riot Society currently has a valid
 13 copyright certificate, it would merely refile the same action the very same day.
 14 This would cause unnecessary delay and give Defendant a second chance to refine
 15 and refile its Motion. Therefore, Riot Society has standing to bring this Action.

16 **B. Riot Society has Stated a Claim for Copyright Infringement**

17 Defendant argues that Plaintiff has failed to state a claim for copyright
 18 infringement for which relief can be granted. Motion at 10:14-11:3. “Failure to
 19 state a claim upon which relief can be granted ... may be raised ... in any pleading
 20 allowed or ordered under Rule 7(a) ... by a motion under Rule 12(c); or ... at
 21 trial.” Fed. R. Civ. P. 12(b)(h)(2). Defendant’s Rule 56 Motion is neither a
 22 pleading under Rule 7(a), a motion under Rule 12(c), nor made during trial.
 23 Accordingly, Defendant cannot raise this argument in its Motion.

24 Defendant argues that it Googled a picture of a panda and that the Original
 25 Design looks similar to the picture it Googled. Motion at 10:15-17. Plaintiff did
 26 not even mention this argument during the meet and confer call.

27 The Original Design is indeed original. When comparing Defendant’s
 28 Exhibits A and B (disregarding the evidentiary problems with both), it is clear that
 Defendant missed obvious differences between the photographs of pandas it

1 purportedly Googled. The Original Design portrays a unique and cartoonish black
 2 and white rendition of a panda bear face where the panda is forward looking; the
 3 eyes lack pupils; the ears contain a white outline, with a rose placed in the mouth
 4 of the panda bear; with the bud on the right, stem on left, and leaves throughout;
 5 and four Chinese letters above the panda. Not one of these unique features is
 6 depicted in any of the 15 images depicted in Defendant's Google screenshot of the
 7 word "panda." Defendant further argues that the Wallpaper Design, existed as
 8 early as 2011. Motion at 10:17-27. Defendant offers no evidence. Defendant has
 9 not indicated what website the Wallpaper Design was purportedly pulled from,
 10 when it was pulled, or even what Google search was performed. Indeed, the only
 11 example of the Wallpaper Design that Riot Society was able to locate is from 2018,
 12 well after Riot Society first published its Original Design in 2017. In any event,
 13 there are significant differences between the Wallpaper Design and the Original
 14 Design in the depiction, orientation, and placement of the images. In the
 15 Wallpaper Design, the panda bear faces various directions, while the Original
 16 Design contains a forward facing panda. The panda in the Wallpaper Design has
 17 pupils; the Original Design panda does not. The Wallpaper Design panda has
 18 fluffy fur; the Original Design panda does not. The Wallpaper Design panda has
 19 as big mouth with a smile; the Original Design panda does not. The Wallpaper
 20 Design is 3 dimensional, the Original Design panda is flat. The Wallpaper Design
 21 lacks both the English and Chinese writing found in the Original Design.
 22 Defendant also claims that Riot Society's brand name in Chinese characters on the
 23 Original Design did not originate from Riot Society. Motion at 10:27-11:2. It is
 24 difficult to imagine who Defendant believes came up with Riot Society's brand
 25 name, other than Riot Society. In any event, Defendant has presented no concrete
 26 evidence, expert or otherwise, and there are enough disputed facts regarding the
 27 various images for this issue to be resolved by a jury.

28 **C. Riot Society's Original Design is Copyrightable**

Defendant argues that Riot Society cannot copyright a picture of a panda

1 under *Satava v. Lowry*, 323 F.3d 805, 813 (9th Cir. 2003). Motion at 11:4-12:6.
 2 Defendant did not even mention this argument during the meet and confer call. In
 3 *Satava*, the Court merely denied the copyright owner's request for a preliminary
 4 injunction, a far cry from granting summary judgment in favor of the defendant.
 5 Further, the *Satava* Court found that ideas expressed in nature are the common
 6 heritage of mankind, and held that the realistic depictions of jellyfish in that case
 7 may not be entitled to copyright protection. *Id.* at 811. Here, however, the
 8 Original Design is not at all a realistic depiction of a panda bear. The Original
 9 Design portrays a unique and cartoonish black and white rendition of a panda bear
 10 face where the panda is forward looking; the eyes lack pupils; the ears contain a
 11 white outline; with a rose placed in the mouth of the panda bear; with the rose bud
 12 on the right, stem on the left, and leaves throughout; and four Chinese letters above
 13 the panda. This is by no means a depiction of an actual panda. And actual pandas
 14 are known to hold bamboo shoots, not roses, in their mouth. But even if the
 15 Original Design contained some unprotectable elements, their unique combination
 16 in the Original Design would be copyrightable. *See id.* ("It is true, of course, that a
 17 combination of unprotectable elements may qualify for copyright protection.")
 18 (emphasis in original). Therefore, Riot Society's Original Design is copyrightable.

19 **D. The Original Design and Infringing Design are Substantially Similar**

20 Defendant argues that the Original Design and the Infringing Design are not
 21 substantially similar. Motion at 12:7-16-27. Although Defendant's counsel briefly
 22 mentioned a lack of similarity during the meet and confer call, he went into zero
 23 details. Now, Defendant spent five pages in the Motion describing purported
 24 differences between the two images.

25 As Defendant states in its Motion, to prevail on a copyright infringement
 26 claim, a plaintiff must prove (1) ownership of a valid copyright and (2) copying of
 27 its work. *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340 (1991).
 28 Typically, a plaintiff may establish the second element by showing that the
 infringer had access to the work and that the two works are substantially similar.

1 *Shaw v. Lindheim*, 919 F.2d 1353 (9th Cir. 1990). Typically, a plaintiff proves
 2 access through circumstantial evidence that its work has been widely disseminated.
 3 *Three Boys Music Corp. v. Bolton*, 212 F.3d 477, 482 (9th Cir. 2000). In rarer
 4 cases, the plaintiff may present circumstantial evidence of access through “a
 5 particular chain of events ... between the plaintiff’s work and the defendant’s
 6 access to that work (such as through dealings with a publisher or record
 7 company).” *Id.*

8 Here, Riot Society has direct evidence of Defendant’s access to the Original
 9 Design. In or around June 2018, Casey Haines, a buyer for the Defendant,
 10 contacted Michael Homayounian, an officer, director, and majority shareholder of
 11 Riot Society. Mr. Haines proposed a partnership between the two companies,
 12 where Defendant would sell products portraying the Original Design. Logic
 13 dictates that if Defendant’s representative proposed a partnership to Mr.
 14 Homayounian involving the Original Design, he necessarily knew of its existence.
 15 Therefore, Riot Society has direct evidence of Defendant’s access to the Original
 16 Design.

17 According to the Ninth Circuit, “[i]n what is known as the ‘inverse ratio
 18 rule,’ we require a lower standard of proof of substantial similarity when a high
 19 degree of access is shown.” *Three Boys*, 919 F.2d at 485; *Sid & Marty Krofft*
 20 *Television Products, Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1172 (9th Cir.
 21 1977) (“[W]here proof of access is offered, the required degree of similarity may
 22 be somewhat less than would be necessary in the absence of such proof.”); *Metcalfe*
 23 *v. Bocho*, 294 F.3d 1069, 1075 (9th Cir. 2002) (“If the trier of fact were to believe
 24 that [Defendants] actually read the scripts ... it could easily infer that the many
 25 similarities between plaintiffs’ scripts and defendants’ work were the result of
 26 copying, not mere coincidence.”).

27 Here, there are substantial similarities between the Original Design and the
 28 Infringing Design. These similarities include:

- 1 • Both designs prominently display a very specific, cartoonish black
- 2 and white rendition of a panda bear;
- 3 • The eyes, nose, and mouth are in black;
- 4 • The ears are in black, with white outline;
- 5 • A rose is placed in the mouth of the panda bear, with the rose bud on
- 6 the right, the stem on the left, and leaves throughout;
- 7 • Both designs include Chinese letters that are similar in number and
- 8 spacing, and look nearly identical, at least to someone who does not read Chinese;
- 9 • Both designs display two English words directly under the panda bear
- 10 with one word containing four letters and one word containing 6-7 letters; and
- 11 • The Chinese and English writing in both designs are in white and the
- 12 entire background of both designs is in black.

13 In light of the long list of similarities between the two designs, and only a
 14 few minimal changes Defendant made to the Original Design to produce the
 15 Infringing Design, there can be no doubt that the two designs are substantially
 16 similar. Here, like in *Metcalf*, “[i]f the trier of fact were to believe that
 17 [Defendant] actually [saw Riot Society’s Original Design] ... it could easily infer
 18 that the many similarities between plaintiffs’ [work] and defendants’ work were
 19 the result of copying, not mere coincidence.” *See Metcalf*, 294 F.3d at 1075. It is
 20 very likely, perhaps certain, that the trier of fact will believe that Defendant
 21 actually saw Riot Society’s Original Design, in light of the evidence that
 22 Defendant contacted Riot Society to propose a partnership based on the Original
 23 Design. Thus, under the “inverse ratio rule,” because of the strong evidence of
 24 access, Riot Society need not come forward with as much evidence of similarity.
 25 Nevertheless, the two images are so similar that they are substantially similar, even
 26 if the “inverse ratio rule” did not apply.

27 Defendant correctly tells the Court that the “extrinsic test” is the only test
 28 relevant to a motion for summary judgment when assessing substantial similarity.

1 Motion at 7:20-21. What Defendant fails to tell the Court is that “[t]he extrinsic
 2 test ***requires*** analytical dissection of a work ***and*** expert testimony.” *Swirsky v.*
 3 *Carey*, 376 F.3d 841, 845 (9th Cir. 2004) (emphasis added); *see also Krofft*, 562
 4 F.2d at 1164 (“Since it is an extrinsic test, analytic dissection and expert testimony
 5 are appropriate.”). Defendant fails to provide any expert evidence with the Motion
 6 whatsoever. To make matters worse, Defendant only points to an unauthenticated
 7 image of what it purports to be the Infringing Garment, not to Defendant’s actual
 8 sample of the Infringing Design.

9 Defendant’s citation to *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir.
 10 2018) is misplaced. Motion at 14:4-15:19. The two images in *Rentmeester* were
 11 both photographs taken from different angles, at different times of day, with
 12 different backgrounds. Here, the Original Design is not a photograph of an actual
 13 panda, but is an entirely creative, unrealistic, drawing of a panda with unnatural
 14 features. Further, here, unlike in *Rentmesster*, the Original Design and the
 15 Infringing Design are on an identical background, using substantially similar, or
 16 even identical, colors.

17 Similarly, defendant’s citation to *Croak v. Saatchi & Saatchi N. Am., Inc.*,
 18 174 F. Supp. 3d 829 (S.D.N.Y. 2016) is also misplaced. Motion at 15:20-16:23.
 19 In this SDNY opinion, unlike here, the plaintiff did not have direct evidence of
 20 access. Further, the two images were not similar. For example, the plaintiff’s
 21 Pegasus was realistic and life-like, but the defendant’s work contained a pink,
 22 smiling, oversized stuffed animal. The two cars in the two images were different.
 23 There were numerous other differences, including in the background.

24 Here, however, the Original Design and the Infringing Design have the same
 25 background, and the same nonrealistic, cartoonish depiction of a panda bear.
 26 Neither image could be mistaken for a photograph or drawing of an actual living
 27 panda bear. Accordingly, the issue of substantial similarity should be decided by
 28 the jury.

V. PLAINTIFF IS ENTITLED TO STATUTORY DAMAGES AND ATTORNEYS' FEES FOR COPYRIGHT INFRINGEMENT

Defendant misconstrues 17 U.S.C. § 412 and relies on the wrong version of Riot Society's complaint, to argue that Riot Society is not entitled to statutory damages and fees. Motion at 17:1-10. Defendant claims that Riot Society failed to file a copyright application within one month after learning of Defendant's copyright infringement in June 2018, as alleged in the Complaint (Dkt. No. 1). Defendant is attempting to mislead the Court by citing to the wrong version of the Complaint, which contained an inadvertent clerical error. Riot Society's First Amended Complaint (Dkt. No. 10) clearly alleges that Riot Society discovered Defendant's copyright infringement in October 2018, not June 2018. Dkt. No. 10, ¶ 12. Riot Society learned of Defendant's infringement in October 2018, not in June 2018. Riot Society filed this action in November 2018, within one month of learning of Defendant's infringement. Therefore, Riot Society is entitled to its demand for statutory damages and attorneys' fees under 17 U.S.C. §§ 504 and 505.

VI. CONCLUSION

For the foregoing reasons, Riot Society respectfully requests that the Court deny Defendant's motion for summary judgment of noninfringement and hold that Riot Society is entitled to statutory damages and attorneys' fees.

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NOVIAN & NOVIAN, LLP

By: /s/ Farhad Novian
 FARHAD NOVIAN
Farhad@novianlaw.com
 SHARON RAMINFARD
Sharon@novianlaw.com
 ALEXANDER KANDEL
AlexanderK@novianlaw.com

Attorneys for Plaintiff